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The Definition of "Accident" in Canadian Coverage Cases and the Unspoken "Useful Purpose" Test

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This paper argues that courts tacitly weigh risks against rewards when constructing the meaning of the term "accident." It suggests the phrase "courting the risk" takes on two distinct meanings. Firstly, at some point, the risks associated with an activity are said to be so substantial as to suggest an insured expected and, thus, courted any resulting losses. Secondly, a party is deemed to court the risk of loss if acting solely for the experience of risk, in and of itself, and not for any other redeeming benefit. The author outlines the evolution of the term "accident" in the case law and contrasts the expectations approach with instances where courts show a concern for the utility or redeeming value of an insured's risk-taking. He argues that judges employ an unarticulated useful purpose test, and considers whether this test is reconcilable with present principles of insurance law.

L'auteur allègue que les tribunaux évaluent tacitement les risques par rapport aux gains lorsqu'ils définissent le mot « accident ». Il avance que l'expression anglaise « courting the risk » (prise de risque) peut s'interpréter de deux façons. En premier lieu, à un certain point, les risques associés à une activité en particulier sont considérés comme étant si élevés qu'il est possible de prétendre que l'assuré prévoyait, et que, par conséquent, il « cherchait les pertes qui en ont résulté. En second lieu, une partie est considérée « courir » le risque de perte » si elle agit exclusivement pour vivre l'expérience, sans aucun autre avantage compensant le risque. L'article décrit l'évolution de la signification du mot « accident » dans la jurisprudence et fait ressortir les différences entre l'approche fondée sur les attentes raisonnables et les affaires où les tribunaux se sont préoccupés de l'utilité ou de la valeur intrinsèque de la prise de risque par un assuré. L'auteur prétend que les juges utilisent une version tacite du critère d'utilité. Enfin, il se demande s'il est possible de concilier un critère d'utilité et les principes actuels du droit des assurances.

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Introduction

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Introduction

Performance artist Brock Enright captured public attention in 2002 when he started a business offering designer kidnappings to New Yorkers.¹ His clients paid thousands of dollars to be seized from sidewalks, gagged, tied, and locked away, sometimes for lengthy periods. His service was tailored to the particular fears and phobias of each client. *Times* reporter Morgan Falconer became squeamish and called off his kidnapping. After the kidnapping, Falconer said Enright transformed into “quite a pussycat.... [It] was just the game, [but] Game or not, it leads you down peculiar alleys.”² While Enright may have cornered a curious market, the appetite for gratuitous risk extends beyond his client-base. People seek gratuitous risk all the time, past the security of games, even to their deaths.

This paper is concerned with the class of actors who take risks gratuitously, for the thrill of risk itself, and yet who seek to use insurance to mitigate the consequences of those risks. It seems strange that individuals take excessive risks with their property or person and yet are risk-averse enough to insure their pecuniary interests. However, as Titus Livy notes, “nothing stings more deeply than the loss of money.”³

Imagine Enright’s service allowed clients in Canada to experience the possibility of death. During each kidnapping, his client would face an agreed upon and randomized probability of being killed. If a death resulted, however, the deceased’s beneficiaries would be unable to claim against an

1. Matt Wells, “Kidnapping for Kicks in New York” *BBC News World Edition* (1 August 2002), online: BBC <<http://news.bbc.co.uk/2/hi/americas/2163666.stm>>.

2. Morgan Falconer, “Kidnapped in the name of art” *Times Online* (14 September 2005), online: *Times Online* <http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/article565980.ece>.

3. Titus Livy, “Nec quicquam acrius quam pecuniae damnum stimulat” *Annales* (XXX, 44).

accidental death policy in this country. The risks would have been too great and the rewards would have been too trivial for the consequences to be deemed accidental. This is because Canadian courts tacitly weigh risks against rewards when constructing the meaning of the term "accident." Canadian courts have adopted legal standards that measure risk—or, alternatively, an insured's perceptions of risk. They do not measure reward. Nevertheless, an insured who takes trivial, purposeless, or foolhardy risks faces an uphill battle in making out her claim.

The interpretation by the courts of coverage under accidental loss policies is broader than it was fifty years ago.⁴ Nonetheless, this paper argues that this approach is constrained by a concern in the case law for the nature and character of an insured's risk-taking. Where risks are taken superfluously or with no apparent redeeming value, courts are more likely to deny coverage. Where an insured can point to some redeeming benefit in the risk, coverage is less likely to be denied. Thus the phrase "courting the risk"⁵ takes on two distinct meanings. Firstly, at some point, the risks associated with an activity are said to be so substantial as to suggest that an insured expected the resulting losses. Such losses are deemed to have been courted. Secondly, risks taken solely for the experience of risk, in and of itself, and not for any other redeeming benefit are also deemed to have been courted. Thus, policyholders who act for the mere "psychological gratification in living on the edge... or in order to impress others with their bravado"⁶ are said to have courted their losses.

This paper is in three parts. Part I outlines the expectations test and its evolution in the case law. It considers the interpretation of the term "accident" in liability, property, and accidental death cases as they tend to borrow definitions from and inform each other.⁷ Part II contrasts the expectations approach to the approach in the case law where courts consider the utility of an insured's risk-taking. The paper argues that judges employ a generally unarticulated useful purpose test. Finally, Part III considers whether a useful purpose test is reconcilable with extant legal doctrine.

4. Barbara Billingsley, *General Principles of Canadian Insurance Law* (Markham, ON: LexisNexis, 2008) at 152.

5. The decision *Candler v. London & Lancashire Guarantee & Accident Co. of Canada* (1963), 40 D.L.R. (2d) 408 (Ont. H.C.) at 421 [*Candler*] is often quoted as authority for the proposition that where an insured "courts the risk" of loss, the policy will not pay.

6. *Martin v. American International Life Assurance Co.*, 2003 SCC 16 at para. 25 [*Martin*].

7. See e.g. *B.C. Master Blasters Inc. v. Aviva Insurance Co. of Canada*, 2006 BCSC 1488 at para. 23 [*B.C. Master Blasters*].

I. *The expectations approach*

1. *The subjective standard*

In 2003, in *Martin v. American International Assurance Life Co.*,⁸ the Supreme Court of Canada established the legal test to be used to distinguish accidental losses from losses attributable to the conduct of an insured. The case involved a claim under an accidental death provision in a life insurance policy. The claimant was a family physician who became addicted to morphine and Demerol after an orthopaedic injury. The insured was on a physician-monitored gradual withdrawal program at the time of his death. He died of a self-administered intravenous overdose of Demerol.

The Court held that whether a death is the result of accidental means is to be determined by assessing the subjective expectations of the insured.⁹ If death came unexpectedly, coverage is upheld. If death was expected, coverage is denied.¹⁰ In many situations, courts will not have direct evidence of an insured's expectations, particularly where there is little evidence surrounding an insured's death. In those cases, a subjective-objective assessment is required.¹¹ Courts will ask whether a reasonable person in the position of the insured and with the insured's particular attributes and understandings would have expected the loss. Thus in *Martin*, the Supreme Court held that the insured's professional background and experience with the drug, his optimism about his future, and the compromising state in which he was found, indicated the insured had not expected to die. Therefore, coverage was upheld.

It is noteworthy that in *Martin*, the trial judge found the insured had deliberately engaged in an activity that posed a high risk of death.¹²

8. *Martin*, *supra* note 6.

9. *Ibid.* at para. 21.

10. See *infra*, note 35 and accompanying text, for further discussion on this point.

11. *Ibid.* The two-step approach reflects that set out in the seminal United States Court of Appeals for the First Circuit decision in *Wickman v. Northwestern National Insurance Co.*, 908 F.2d 1077 (1st Cir. 1990).

12. The Supreme Court of Canada does not expressly reject this factual finding. On the other hand, in discussing the trial judge's failure to consider evidence suggesting that the insured had not expected to die, the Court suggests that some of the evidence supports the conclusion that the insured had not even turned his mind to the possibility of death, *Martin*, *supra* note 6 at para. 37:

The first set of facts concerns the circumstances in which Dr. Easingwood's body was found. The body was found in a dishevelled state inappropriate for someone who anticipates death as a potential result of his actions. He was lying prone in his office with his glasses broken on the floor beside him, with his jeans partially pulled down, revealing the site where he had injected the Demerol. These facts point strongly to the conclusion that Dr. Easingwood did not expect to die; indeed they suggest that he did not so much as turn his mind to the possibility that death would result from his actions [emphasis added].

At any rate, the Court held, as discussed above, that having foresight of the possibility of death is too low a test for accident and does not determine the issue.

However, this finding did not determine the issue. The Court confirmed that an occurrence can be deemed "accidental" even if the insured acted with foresight of the possibility of loss:

The trial judge found at para. 11, that Dr. Easingwood was engaging in a "particularly hazardous" activity. Given this high risk, death "would not reasonably be viewed as an unlikely result" (para. 14). This set the legal threshold too low. As this Court affirmed in *Stats, supra*, death as a result of even highly dangerous activities may be accidental. The issue is not whether the activity was dangerous, or even whether death was likely, but whether the insured expected or intended to die. While the trial judge said the death could not be viewed as an unexpected event, he equated this with objective likelihood, not with whether the insured expected to die.¹³

An insured's deliberate participation in a particularly hazardous activity, or foresight of the possibility of loss, is not enough to show that he or she expected the loss. On the other hand, it is possible to expect something without intending it. In *Martin*, the insurer conceded in an agreed statement of facts that the insured had not intended to die.¹⁴ The Court held that an insurer cannot validly deny coverage simply because the insured acted with foresight of the possibility of loss. Yet, in some circumstances coverage can be denied without proof that the insured actually intended to bring about a loss:

The authorities clearly stipulate that the mere fact that someone has engaged in a dangerous or risky activity does not rule out the possibility that death was accidental, absenting special exclusion clauses in the insurance policy (*Candler, supra* at p. 421; *Canadian Indemnity, supra*, at pp. 316-17). However, the decision to "court the risk" of death, as Spence J. phrased it in *Stats, supra*, at p. 1162, becomes at some point equivalent to an intention to die.¹⁵

The Court does not explain what, in addition to foresight, is required to establish an insured's expectations. The decision simply suggests that in "this small but difficult class of cases, trial courts must work out the results as best they can."¹⁶ Presumably, at some point, the risks of

13. *Martin, supra* note 6 at para. 34.

14. *Ibid.* at para. 33.

15. *Ibid.* at para. 23.

16. *Ibid.* at para. 24.

foreseeable losses become so considerable that they allow the inference of an expectation to die. Where this occurs is unclear.¹⁷

2. *The objective standard*

The expectations test has come to widely define the term "accident" in insurance policies and has applicability to both first-party and third-party policies.¹⁸ The decision in *Martin*, however, represents an extension of doctrine, rather than a marked departure. While the legal rule has evolved from a more restrictive objective standard to the more liberal subjective standard employed in *Martin*, the jurisprudence has generally drawn its definitions of accident from an assessment of the expectations and intentions of the insured or from those of a reasonable person in the place of an insured. In the 1903 House of Lords decision in *Fenton v. J. Thorley & Co.*, Lord Lindley stated, "[t]he word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended occurrence which produces hurt or loss."¹⁹ The objective statement of this rule is offered in *Halsbury's Laws of England*:

The idea of something haphazard is not, however, necessarily inherent in the word; it covers any unlooked for mishap or an untoward event which is not expected or designed, or any unexpected personal injury resulting from any unlooked for mishap or occurrence. The test of what is unexpected is whether the ordinary reasonable man would not have expected the occurrence, it being irrelevant that a person with expert knowledge, for example of medicine, would have regarded it as inevitable.²⁰

The objective test outlined in *Halsbury's* was adopted by a number of courts prior to the decision in *Martin*.²¹ This test is more restrictive. An insured holding an honest, though unreasonable, belief that his or her conduct would not cause a loss is denied coverage under the objective

17. The same observation has been made of American case law on the definition of the term "accident." See e.g. Peter John Daue, "The Foolish Insured and Double Indemnity" (1963) 20 Wash. & Lee L. Rev. 143 at 147.

18. See e.g. *B.C. Master Blasters*, *supra* note 7 at para. 23. James Rendall argues that the equation of the definitions of accident in third-party cases with those in accidental death claims occurred as early as *Stats v. Mutual of Omaha Insurance Co.*, [1978] 2 S.C.R. 1153 [*Stats*] cited in James A. Rendall, "Drink, Drive and Die! Then Ask us to Define Accident" (1978-1979) 9 Man. L.J. 101 at 110-111 [Rendall, "Drink, Drive and Die!"].

19. [1903] A.C. 443 at 453.

20. *Halsbury's Laws of England*, 3rd ed., vol. 22 (London: Butterworths, 1954) at 294 [*Halsbury's*].

21. See e.g. *Johnson v. Mutual of Omaha Insurance Co.* (1984), 45 O.R. (2d) 676 (C.A.); *Trynor Construction Co. v. Canadian Surety Co.* (1970), 1 N.S.R. (2d) 599 (S.C.A.D.) [*Trynor*]; *Park Plaza Cleaners Ltd. v. Saskatchewan Government Insurance* (1983), 17 Sask. R. 1 (Q.B.); *Dukoff v. London Life Insurance Co.*, [1981] O.J. No. 591 (H.C.J.) at para. 13.

approach. Today the coverage would be upheld. Yet, the distance between the objective and subjective tests is not as marked as it might appear at first blush. Firstly, the distinction is of no importance when a court has little or no evidence of an insured's state of mind. Secondly, courts in the past seldom went so far as to suggest that objective foresight or negligence was sufficient to negate coverage. In *Marshall Wells Ltd. v. Winnipeg Supply & Fuel Co.*, an insured corporation was denied coverage under a third party liability policy after losses resulted from the collapse of a water tank.²² Agents of the corporation knew prior to the loss that the tank was inadequately supported. The majority of the Manitoba Court of Appeal found the resulting losses were foreseeable, the insured had voluntarily assumed a calculated risk, and this risk-taking took the occurrence outside of the definition of accident. In a dissenting judgment, Justice Freedman held that negligent conduct can be considered accidental:

That a mishap might have been avoided by the exercise of greater care and diligence does not automatically take it out of the range of accident. Expressed another way, "negligence" and "accident" as here used are not mutually exclusive terms. They may co-exist.²³

Justice Freedman's dissenting approach was adopted by the Supreme Court of Canada in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*²⁴ While the Court maintained an objective standard for assessing expectations,²⁵ the Court rejected the notion that evidence of calculated or negligent risk-taking was sufficient to preclude an event being deemed accidental. The Court stated:

[On the insurer's argument], the insured would be denied recovery if the occurrence is the result of a calculated risk or of a dangerous operation. Such a construction of the word "accident" is contrary to the very principle of insurance which is to protect against mishaps, risks and dangers.²⁶

In the decision *Stats v. Mutual of Omaha Insurance Co.*, the Supreme Court of Canada extended the scope of accident coverage to gross negligence:

Therefore, I am in agreement with Blair J.A. when, in giving reasons, he said that there was every justification for the learned trial judge's description of the deceased woman's conduct as dangerous and grossly

22. (1964), 49 W.W.R. 664.

23. *Ibid.* at para. 4.

24. [1976] 1 S.C.R. 309 (WC) [*Walkem*].

25. *Ibid.* at para. 19.

26. *Ibid.* at para. 15.

negligent but that that was far different from finding that the insured actually and voluntarily “looked for” or “courted” the risk of the collision that killed her.²⁷

The inclusion of negligence, calculated risk-taking, and gross negligence within the sphere of activity that can be considered accidental allows a distinction between reasonable foresight of loss and the reasonable expectations of loss—a reasonable person can be held to have foreseen a loss without having expected it. This distinction reduces the seeming strictness of the reasonableness standard.

Thirdly, the Court in *Martin* held that an insured can be deemed to have subjectively expected his or her losses in situations where an insured’s risk-taking is particularly excessive—or where the insured courts the risk of loss.²⁸ For example, the Court cites the situation in *Candler* with approval; coverage was denied to the beneficiaries of an insured who fell to his death during a stunt performed for his friend on a hotel balcony which was thirteen floors above ground.²⁹ *Martin* states, “[o]ne might speculate that the trial judge [in *Candler*] concluded that, despite a hope and belief that he would survive, the insured had knowingly adverted to the risk and must have, on some level, expected death.”³⁰ This, again, closes the gap between the objective and subjective expectations test. The finding that a party acting without the intention to cause a loss actually adverted to or courted the risk of loss (the subjective standard) is not far removed from the finding that a party’s expectation to escape loss was unreasonable (the objective standard).

II. *Chain of causation*

A related body of older cases focused on whether a chain of events set in motion by an insured was broken by an event falling outside of the normal

27. *Stats*, *supra* note 18 at 1162.

28. Prior to *Martin*, Professor James Rendall argued that the decisions of the Supreme Court of Canada in *Stats* and, more particularly, *Walkem* seemed to have eliminated the “courting the risk” category of cases. James A. Rendall, “Annotation,” *Wawanesa Mutual Insurance Co. v. Hewson*, 2003 CarswellSask 191 (Q.B.). With respect, this conclusion seems overstated. The cases do adopt a more liberal standard. The Court in *Stats* expressly states that the expectations approach is consistent with the earlier decisions which applied the courting the risk standard, *supra* note 18 at paras. 20-21. See E.H. McVitty, “Foreseeability—The Scene of the Accident Revisited” (1979-1980) 10 Man. L.J. 443 at 448-449. Moreover, the Court’s statement in *Martin*, *supra* note 6 at para. 26 that an insured who does not desire an outcome could, nevertheless, knowingly avert to the risk and, on some level expect loss, suggests the old category is alive and well.

29. *Supra* note 5.

30. *Supra* note 6 at para. 26.

course of things.³¹ The Quebec Superior Court's decision in *Claxton v. The Travellers Insurance Co. of Hartford* offers a frequently cited definition:

"Accident" has been defined to be unusual and unexpected result attending the performance of a usual and necessary act. It is an unexpected event which happens as by chance, or which does not take place according to the usual course of things. Any event which takes place without the foresight or expectation of the person affected by the event; or is an unusual effect of unknown cause and therefore not expected.³²

Couch's Cyclopedia also states, "[i]n other words, an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected."³³ Some Canadian courts have used the standard of natural or probable results or the usual course of things to determine whether or not a voluntary human act was considered the proximate cause of an insured's loss and, thus, outside of an accidental loss policy. Where voluntary conduct is succeeded by something out of the ordinary and a loss results, the interceding element is considered the proximate cause and the loss as accidental. For example, in *Greenway v. Saskatchewan Government Insurance Office*, an insured was involved in a chase with the police and rolled his car while attempting a high speed turn at an intersection. His injuries were deemed the natural consequences of his course of conduct, and nothing fortuitous was said to have intervened between his conduct and his losses.³⁴

The Supreme Court of Canada has recently clarified the difference between accidents and diseases in *Co-operators Life Insurance Co. v. Gibbens*.³⁵ *Gibbens* involved a claim on an accident policy of an insured who contracted a rare and debilitating form of herpes during unprotected sex and was left paralyzed from the mid-abdomen down. Binnie J., for

31. For example, James Rendall draws a similar distinction in older Canadian cases between those which equated recklessness with an intention to cause loss and those which analyzed the proximate cause of the loss. Rendall, "Drink, Drive and Die!", *supra* note 18 at 104-108.

32. (1917), 36 D.L.R. at 485 [*Claxton*]. The definition of an accident as an "unusual and unexpected result attending the performance of a usual and necessary act" traditionally defined what has been called an accidental results policy. In older cases, courts suggested that an accidental means policy covers the results following an unusual and unexpected source. As noted above, this distinction was rejected in *Martin*, *supra* note 6. Notably, George James Couch, *Couch Cyclopedia of Insurance Law* (Rochester, NY: Lawyers Co-operative, 1959) vol. 5 at 3976 criticizes the application of the definition in *Claxton* to accidental means policies.

33. *Ibid.*, vol. 10, s. 41:6.

34. (1967), 59 W.W.R. 673 (Sask. Dist. Ct.). See also, *Sloboda v. Continental Casualty Co.*, [1938] 2 W.W.R. 237 (Alta. S.C. (A.D.)) at para. 9.

35. 2009 SCC 59 [*Gibbens*].

the unanimous Court, adopted the following frequently cited distinction between accident and disease from *Welford's Accident Insurance*:

The word "accident" involves the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes; and injury caused by accident is to be regarded as the antithesis to bodily infirmity by disease in the ordinary course of events.³⁶

In *Gibbens*, Binnie J. notes that disease represents a special subset of unexpected mishaps:

Traditionally, the courts have carved out of the potential universe of "unlooked-for mishaps or untoward events which are not expected or designed" the sub-universe of bodily infirmities cause by disease in the ordinary course of events."³⁷

It is noteworthy that *Gibbens* states the expectations analysis is largely confined to cases considering an insured's miscalculated but intentional risk-taking.³⁸ These are called miscalculation cases.³⁹ The decision states that the accidental and the unexpected are not necessarily one and the same:

[E]xpectations, while relevant, must be placed in the context of the other circumstances of the case. Neither the means nor the result should be viewed in isolation. ... There is no necessary equivalence between "unexpected" and "accident". If a man, sitting at a bus station, is hit by a bus that has careened out of control, that is unquestionably an accident—but it is not an accident by virtue of the fact that the man did not expect it.⁴⁰

These comments could imply that courts should take a two-step approach to considering whether a mishap is deemed an accident. Firstly, courts assess the subjective expectations of the insured. Secondly, if a loss is deemed to have been subjectively unexpected, a court considers whether it flowed from the ordinary course of events. If the loss came as a result of an insured's intentional risk-taking, the second step is unnecessary and the subjective expectations analysis will suffice. If the unexpected loss was produced by a force other than the insured's intentional risk-taking, the

36. A.W. Baker Welford, *Welford's Accident Insurance*, 2nd ed. (London: Butterworth, 1932) at 268 cited in *Gibbens*, *ibid.* at paras. 17 and 36.

37. *Supra* note 35 at para. 29.

38. *Ibid.* at paras. 42 and 45.

39. *Ibid.* at para. 42.

40. *Ibid.* at paras. 44 and 45.

court must consider whether the loss resulted from a natural, unnatural, ordinary, or abnormal sequence of events.

This paper considers only the miscalculation line of cases—namely, those involving an insured's intentional risk-taking. Subjective expectations, as set out in *Martin*, likely survives *Gibbens* as the governing legal standard in this large subset of accident insurance law. Nevertheless, the *Gibbens* distinction between accidents and expectations suggests that courts may be open to arguments based on objective standards.

The differences between a chain of causation or natural and ordinary course analysis and an expectations analysis are important.⁴¹ Natural and probable results employs an *ex post* and conceptually objective understanding of causal processes. Expectations assess an individually-situated understanding of causation from the *ex ante* perspective of the insured. In most cases, a natural and probable results analysis will approximate an expectations analysis. Where an outcome follows as the natural or probable consequence of an action, the losses will generally be deemed to have been expected.⁴² Where a voluntary act is followed by events outside the usual course of things, the consequences generally come unexpectedly. These two approaches are often used interchangeably. Consider, for example, the language of the decision in *MacIsaac v. CNA Assurance Co.*:

In my view it is the unexpectedness of the result that is the essence of what is meant by the term "accident or accidental" in policies of this sort. If a result of the type or kind that actually happens *could be foreseen as a natural and probable result* of the act engaged in, then the actor can be said to be courting the risk. What follows then ceases to be accidental even though it was hoped that a particular result would not follow [emphasis added].⁴³

In a miscalculation case, there will be some threshold degree of risk after which a court will deem the insured to have reasonably or subjectively expected loss as a probable result. All the tests discussed above are concerned primarily with the probability or likelihood of loss, as assessed, either upon what would have been expected to occur or upon what normally occurs in like situations or in everyday life. Expectations or

41. This distinction has been the site of a great deal of debate in legal theory. The move from the use of natural and probable results standards to foreseeability standards in tort law, generally bears the influence of the American Realist movement and represents one of their most important and lasting achievements. Morton Horowitz, "The Doctrine of Objective Causation" in David Kairys ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982).

42. *Crisp Estate v. Great American Indemnity Co.*, [1961] O.J. No. 170 (C.A.) at para. 6.

43. [1979] N.S.J. No. 573, 32 N.S.R. (2d) 380 (S.C.A.D.) at para. 26 [*MacIsaac*].

natural and probable results analyses are not concerned with the returns or redeeming benefits gained from risk, or with the moral or economic implications of risk-taking. If the courts, as this paper argues, determine the scope of coverage by considering the reasonableness of risk-taking (to be distinguished from the reasonableness of an insured's expectations of loss) or the efficiency of risk-taking, this determination is not explicit. It is left unspoken. Nonetheless, the economic or social value of a risk can dramatically influence the disposition of a case.

III. *The useful purpose test*

Take the following two examples. Firstly, an individual covered under an accidental death policy participates in a game of Russian roulette. The revolver has six chambers. Only one bullet is chambered. The insured faces a 16.7% chance of death. A referee spins the cylinder and then, without ascertaining the position of the chambered round in relation to the firing pin, locks the barrel in place and hands the revolver to the insured. The insured pulls the trigger and is killed instantly. His beneficiaries claim against his insurer.

Secondly, an individual with the same coverage makes occasional trips to the Canadian north. She is required to traverse the Mackenzie River at Fort Providence, NWT. In the summer, she can cross by ferry. In the winter, the river freezes over and automobiles are permitted to travel over the river on an ice road. On April 13th the insured departs, expecting the road to be open. When she reaches the river, she finds it closed. Ferry service does not begin until mid-May. She knows the road generally closes around mid-April and that the ice has yet to break up. She can be fined for crossing the closed road, but knows a number of people who have used it as late as the start of May. It is very late into the night and the closest motel is two hours south and it charges a mint. She estimates her odds of making it across at 83.3% and decides to chance the road. Halfway across, however, she hits a weak patch of ice. The ice cracks, the insured's truck falls under the ice shelf and the insured dies. Her beneficiaries claim against her insurer.

In both examples, the insureds face the same likelihood of death. Neither desires death. They both *intend* to survive the risk. On a strict application of an expectations approach, there may be little to distinguish the two cases. However, the treatment of these examples by the courts might well differ. The first is clearly excluded under an accidental death policy. The claim of the insured who dies playing Russian roulette was considered by the Court of Appeals of Georgia in *Thompson v. Prudential*

Insurance Co. of America,⁴⁴ and has been cited in many Canadian decisions as a paradigmatic example of courting the risk of loss.⁴⁵

The outcome of the second example is less certain. There are many instances where courts have upheld accident coverage for policyholders who participate in dangerous activities. It was considered an accident where a dentist died as the result of sniffing ether from a bathing cap to relieve stress and depression;⁴⁶ an insured died during autoerotic asphyxia;⁴⁷ a stuntman died while attempting to dive into a small pool from the ceiling of the Houston Astrodome;⁴⁸ and a hunter shot a member of his party after negligently firing into the woods believing he had spotted a deer.⁴⁹ The risk of loss was present in the mind of the insured in our second example, but the Supreme Court of Canada is also clear that calculated risks can still produce accidents. Risk-taking, even negligent, grossly negligent, or calculated risk-taking, is not a bar in and of itself to coverage.

Arguably, the second example is analogous to the facts of *Trynor*.⁵⁰ In *Trynor*, one of the insured's senior drivers was tasked to deliver a bulldozer resting on a flat bed that was attached to the back of a Mack tractor, to the company's gravel pit. On route, he came to a bridge. He stated to a co-employee: "I wonder how strong that is?" After considering the difficulty of lowering the tractor to the bank and driving across the stream bed, he decided to risk crossing the bridge. His testimony at trial was, as follows:

So I asked him, I said, would you suppose that the bridge is strong enough to carry us? So he went down, he was gone quite some time, he came back up, and he said, 'It looks all right.' So we stood there, like he stood by the cab talking for a couple of minutes, we decided that there was no sign on the bridge or anything, so that we would try it. So I proceeded to cross the bridge. That's what happened.⁵¹

44. 66 S.E.2d 119 (Ga. Ct. App. 1951).

45. See e.g. *Candler*, *supra* note 5 at para. 20; *Martin*, *supra* note 6 at para. 25; *MacIsaac*, *supra* note 43 at para. 23; *Booth v. British Columbia Life & Casualty Co.*, 2003 BCSC 668 at para. 27 (the Court rejected the claim due to an exclusion for injuries incurred while voluntarily intoxicated. This ruling was upheld on appeal); *Johnson v. Mutual of Omaha Insurance Co.* [1982] O.J. No. 3543, 39 (2d) O.R. 559 at para. 49 [*Johnson*].

46. *Johnson*, *ibid.*; *Bertalan Estate v. American Home Assurance Co.*, 2001 BCCA 131 [*Bertalan*].

47. *C.J.A. v. American Home Assurance Co.*, 2001 BCCA 132 [*C.J.A.*].

48. *Soucek Estate v. Atlantic Mutual Life Assurance Co.*, [1988] O.J. No. 1482 (Dist. Ct.) [*Soucek*].

49. *Bowering v. Mutual Life Assurance Co. of Canada*, [1975] N.J. No. 51 (C.A.).

50. *Trynor*, *supra* note 21.

51. *Ibid.* at 604.

The insured's losses were held to have been accidental and within the policy, notwithstanding that the driver took a calculated risk by trying to cross the bridge.

It is difficult to know if the same reasoning would be applied to our second example. The weight of authority supports a finding of accident. Thus, the distinction between the first and second examples merits examination. If courts simply assess an insured's perceptions of the *ex ante* probability of loss, it is not clear why the court would uphold coverage in one case but not the other. If there is a distinction to be made between the two examples, it does not have anything to do with the perceived likelihood of death. Rather, a distinction is found in the character of the risk-taking and the redeeming benefit of the risk. The expectations test does not accommodate these considerations. These considerations do, on the other hand, colour the meaning of the phrase "courting the risk." The phrase is used to refer to conduct that involves a substantial likelihood of loss.⁵² This phrase is also used to refer to those who, like the participant in Russian roulette, engage in risks superfluously, gratuitously, or to simply experience the risk.⁵³ While the latter meaning is not reflected in the expectations test, it exerts a tacit influence on the case law.

There is an obvious and uncontroversial way in which a concern for the character or purpose of an insured's risk-taking influences the caselaw. Evidence of purpose can help establish motive. In many cases, it is disputed whether the insured desired and intended to bring about the loss in question. For example, circumstances surrounding the death of an insured under a life or accidental death policy might give rise to suspicions of suicide. In these circumstances, if the insured engaged in highly risky conduct with no apparent redeeming value, a court might infer that the insured actually wanted to die and that the death was a suicide.⁵⁴ This is a factual inference.

52. Professor Rendall divides this type of "courting the risk" cases into those in which an insured voluntarily exposes him or herself to danger and those in which an insured is reckless or wanton with his or her risk-taking. Rendall, "Drink, Drive and Die!", *supra* note 18 at 110. With respect, this seems to be a fine distinction. As this paper argues, the more salient distinction is between instances where an insured courts the risk by taking a risk with an extremely high probability of loss and where an insured courts the risk by taking risks purposelessly, gratuitously, or simply for the purpose of risk-seeking.

53. See e.g. Sam Erman, "Word Games: Raising and Resolving the Shortcomings in Accident-Insurance Doctrine That Autoerotic-Asphyxiation Cases Reveal" (2004-2005) 103 Mich. L. Rev. 2172 at 2184. Erman suggests American courts have not recognized acts of "high-risk bravura" as accidental.

54. Robert I. Simon, "You Only Die Once—But did you Intend It?: A Psychiatric Assessment of Suicide Intent in Insurance Litigation" (1989-1990) 25 Tort & Ins. L.J. 650 at 655.

In many cases, it is clear that the insured did not desire the loss in issue, but knew that his or her conduct carried the risk of loss.⁵⁵ For example, in *Candler* it was clear that the insured did not want to die, but wilfully risked death by prostrating himself along the coping of his balcony.⁵⁶ In *Walkem*, the insured did not want his workmanship to fail. Nevertheless, he was held to have been aware of the risk of returning the plaintiff's equipment in an inadequate state of repair.⁵⁷ In *Trynor*, it is obvious the insured's employee did not want the bridge to collapse. The employee, on the other hand, ran the risk.⁵⁸ In these cases, the coverage issue is whether the insured's foresight of the perceived probability of loss is deemed "equivalent to the intention"⁵⁹ to cause the loss. This conclusion is considered a factual inference to be drawn from the circumstances.⁶⁰

On the other hand, where it is clear that an insured took a risk without intending to cause a loss, evidence of the purpose of the insured's risk-taking does not help establish that the loss was unexpected. The likelihood of a loss occurring does not decrease simply because a risk is taken with some purpose in mind. If courts wish to disallow coverage for purposeless risk-taking, the term "expected" is probably not the most fitting. In its plain and ordinary use, the term "expectations" refers to the perceptions of probability or likelihood, rather than defensibility or rationality.⁶¹ Taking risks gratuitously, or without reason does not make them any less probable or likely. A different test is required. This might be formalized as a useful purpose test.

American tests for recklessness in tort might serve as models. *Prosser and Keeton on the Law of Torts* suggest an actor is reckless where:

55. The Court in *Martin*, *supra* note 6 at para. 24 describes this as "a small but difficult class of cases" in the context of accidental death claims. However, this class makes up the lion's share of third party liability claims where policyholders are held liable in negligence and, thus, to have foreseen the possibility of the plaintiff's losses. As Justice Pigeon writes in *Walkem*, *supra* note 24 at para. 13:

However, I wish to add that, in construing the word "accident" in this policy, one should bear in mind that negligence is by far the most frequent source of exceptional liability which a businessman has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called "comprehensive". But foreseeability is an essential element of such liability. If calculated risks and dangerous operations are excluded, what is left but some exceptional causes of liability?

56. *Candler*, *supra* note 5.

57. *Walkem*, *supra* note 24.

58. *Trynor*, *supra* note 21.

59. *Martin*, *supra* note 6 at para. 23.

60. *Ibid.* at para. 32.

61. The American Heritage dictionary, for example, defines "expected" (in the sense used by the courts) as follows: "a. To look forward to the probable occurrence or appearance of: *expecting a telephone call*; b. To consider likely or certain: *expect to see them soon*; *expects rain on Sunday*." "Expected." *The American Heritage® Dictionary of the English Language, Fourth Edition*. s.v. "expected," online: Dictionary.com <<http://dictionary.classic.reference.com/browse/expected>>.

the actor has intentionally done an act *of an unreasonable character* in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences [emphasis added].⁶²

The *Restatement (Second) of Torts* defines recklessness as:

intentionally fail[ing] to do an act... knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates *an unreasonable risk* of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent [emphasis added].⁶³

Both tests include an assessment of the rationality or defensibility of the actor's risk-taking. A comparable test for insurance purposes might be that the claim fails if an insured is unable to demonstrate purpose to his or her risk-taking.

The distinction between the utility derived from simple risk-seeking behaviour and utility derived from a redeeming purpose may be illusive in some circumstances. If such a test were formulated doctrinally it arguably should not mask a moral disapprobation about the nature of an insured's conduct.⁶⁴ However, there may be relatively non-contentious categories of risks that would be recognized as superfluous or as having no other purpose than the experience of the risk itself; the case of Russian roulette is an example.

1. *Examples*

A concern for utility and motive sometimes insinuates itself into the language of the legal standards used to delineate the boundaries of the term "accident." Take for example, the decision *Oakes v. Sun Life Assurance Co. of Canada*.⁶⁵ In *Oakes*, an insured was killed in a high speed chase with the police. The trial judge, in reasons delivered orally, found that the insured courted his loss. As such, coverage was denied. The decision reads:

62. W. Keeton et. al., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, MN: West Co., 1984) at 213.

63. *Restatement (Second) of Torts* (American Law Institute, 1965) § 500.

64. Malcolm Clarke suggests that the case law is often influenced by whether an insured has participated in morally objectionable or foolhardy conduct. *Policies and Perceptions of Insurance: An Introduction to Insurance Law* (Oxford: Clarendon Press, 1997) at 221-224. See e.g. *C.J.A. supra* note 47 at para. 6 (the British Columbia Court of Appeal cautions against importing moral judgment into tests for coverage). See also Catherine Spain, "Reasonable Expectations in the Sphere of Liberty: A Theory of Accidental Death Insurance Coverage" (2006) 12 Conn. Ins. L.J. 657 at 663 [Spain, "Reasonable Expectations"].

65. (1978), 93 D.L.R. (3d) 80 (B.C.S.C.) [*Oakes*].

In this case I am convinced that Oakes was "*actually and voluntarily looking for and courting the risk* of the collision" that killed him. It cannot matter, in my opinion, that the risk of being struck from behind was not as great as the risk of running into a southbound vehicle or of colliding with a police vehicle upon being forced over to the side of the highway. Oakes may and *probably did expect to outrun his pursuers* and to escape injury, but as in *Candler*, the collision which caused Oakes' death was not "an unusual or unexpected incident associated with the deceased's actions" [citations omitted; emphasis added].⁶⁶

The trial judge distinguishes between expecting and courting death. Oakes was said to have probably expected to survive and yet was still found to have been courting the risk of collision. Thus, an insured who does not expect loss can still be said to have courted loss. It is noteworthy that the decision nonetheless suggests at the end of the passage that Oakes' death was not an unexpected incident. The reasons are scant, were delivered summarily, and are too confused on the issue to form grounds for a legal distinction between courted and unexpected losses.⁶⁷

The distinction between expectations and courting the risk hinted at in *Oakes* is more clearly supported if we consider the disposition of cases on their facts rather than the language in which the legal standards are formulated. In the frequently cited decision of *Candler*, the Court was faced with the claim of a man who placed himself on the balustrade of his thirteenth floor hotel suite in order to demonstrate his nerve to a friend.⁶⁸ The insured lost his balance and fell to his death. His beneficiaries claimed on an accidental death policy. The trial judge found that the insured courted the risk of falling and that, notwithstanding that the insured had "hoped and probably believed that he could accomplish the attempted feat without injury" that he still had "present in his mind the risk involved."⁶⁹ The lengthy reasons and detailed review of the law do not mention whether the character or benefit of risk-taking ought to inform the decision. Yet, the judge's summary of the facts demonstrates a conspicuous concern with *Candler's* character and the nature of his risk. *Candler* is described as a "very determined, egotistical and reckless individual."⁷⁰ The judgment

66. *Ibid.* at para. 7.

67. James Rendall suggests that this case represents a sighting of the undead concept of courting the risk. Rendall, "Drink, Drive and Die!", *supra* note 18. As suggested, the weight of authority suggests that the expectations test and the courting the risk tests are compatible and complimentary. The decision in *Oakes*, *supra* note 65, demonstrates a conflict between the two. It may be, however, that the decision simply is not good law.

68. *Supra* note 5.

69. *Ibid.* at para. 32.

70. *Ibid.* at para. 6.

goes into considerable detail about the excessively useless nature of the risk. It compares this risk to other risky ventures from his life:

However, in most of the incidents referred to in the evidence, there was something to be accomplished by his unusual acts. In permitting an adversary to exert a dangerous hold on him in judo exercises he gained knowledge of the effect of such holds. His feat of climbing the mast of the boat in stormy weather was to make adjustments to the rigging. Riding a strange horse bareback over the hurdle was a means of testing out the horse in the contemplated purchase. Walking out on the catwalk surrounding the flagpole on the top of the hotel in Cleveland may have afforded him some thrill from the view of the city that was afforded thereby. His acts on the night in question in assuming the dangerous position he did on the top of the coping could have no useful purpose whatever except the obvious opportunity to convince Simmonds that he possessed sufficient nerve to accept the challenge that was associated therewith. His conduct was foolhardy and attended with the most obvious danger.⁷¹

Unlike Candler's other risks, the risk that killed him had no purpose. There was not something to be accomplished in the insured's risk-taking, and the claim failed.

The case contrasts with the decision of the Ontario District Court in *Soucek*.⁷² The deceased was insured under a standard accidental death policy. He was an experienced stuntman with a penchant for dramatic and death-defying acts. For example, in 1984, he locked himself in a specially-fitted barrel and was dropped over the Niagara Falls. The next year, he again placed himself in a specially-fitted barrel, this time in front of thousands of onlookers at the Houston Astrodome. He was lifted 118 feet to the building's ceiling and was positioned over a small tank of water. When the rope was released something went wrong. Instead of falling into the tank, the barrel struck its side, and Soucek suffered fatal injuries.⁷³ His estate claimed on the accidental death policy. The Court upheld coverage. It found that the onus was on the insurer to exclude stunts.⁷⁴ Moreover, the Court held that, as Soucek had intended to survive the act, his death was accidental. The decision reads:

Dealing with the facts of the case before me, it is clear that Soucek was a stuntman and one must assume that his intention was that the descending barrel would drop into the 12-foot wide tank containing 9 feet of water. In fact the foot of the barrel struck the side of the tank with great force.

71. *Ibid.* at para. 33.

72. *Supra* note 48.

73. *Ibid.* at para. 1.

74. *Ibid.* at para. 19.

This, to my mind, was the "accident" and as a result of that Soucek died.⁷⁵

The decision cites but does not expressly distinguish *Candler*. If there is a distinction to be drawn between the two cases, it is likely not found in the degree of danger the men faced. The distinction is more readily explicable by reference to a useful purpose standard. As the court stresses, Soucek was a "stuntman." He was chiefly employed to flaunt risk in front of thousands of onlookers. His stunt, like *Candler*'s, was a test of nerve. However, these tests were Soucek's business and his risk had a redeeming commercial value.

The British Columbia Court of Appeal considered the meaning of the term "accident" in relation to high-risk conduct in the decision in *C.J.A.*⁷⁶ In *C.J.A.*, the insured died during auto-erotic asphyxiation.⁷⁷ The insured placed a mask and bag over his face in order to reduce the flow of blood to the brain and heighten the sexual pleasure of masturbating. The insured was found to have miscalculated the amount of oxygen he required and died in the act. While the Court acknowledged that "the deliberate reduction of oxygen to one's brain is an inherently dangerous activity,"⁷⁸ it found that "the reasonable ordinary person, not affected by a moral judgment about the activity, would not see death as its *objectively foreseeable* result [emphasis added]."⁷⁹ It seems curious and confusing that an insured participating in an inherently dangerous activity would be unable to reasonably foresee the possibility of death. The Court characterizes the event as a "misjudgment."⁸⁰ The characterization implies that the insured was, in fact, cognizant of the risks of death and calculated, if erroneously, the measures necessary to avoid death. Moreover, the objective foreseeability standard is inconsistent with the Supreme Court of Canada's holding that calculated risk-taking and gross negligence often

75. *Ibid.* at para. 20.

76. *Supra* note 47. The decision was released concurrently with the decision in *Martin*, *supra* note 6 and *Bertalan*, *supra* note 46.

77. In the United States, different jurisdictions have decided the claims of beneficiaries to policyholders who died during autoerotic asphyxiation for double indemnity or accidental death benefits who died during autoerotic asphyxiation differently. Recovery was allowed in *MAMSI Life & Health Insurance Co. v. Callaway*, 825 A.2d 995 (2003); *Todd v. AIG Life Insurance Co.*, 47 F.3d 1448 (1995); *Connecticut General Ins. Co. v. Tommie*, 619 S.W.2d 199 (Tex. Civ. App. 1981); *Kennedy v. Washington Nat'l Ins. Co.* 136 Wis. 2d 425 (Wis. Ct. App. 1987). It was denied in the decisions *Cronin v. Zurich Am. Ins. Co.* 189 F. Supp. 2d 29 (S.D.N.Y. 2002); *Runge v. Metropolitan Life Insurance Co.*, 537 F.2d 157 (1976); *International Underwriters, Inc v. The Home Ins. Co.*, 662 F.2d 1084 (4th Cir. 1981); *Sigler v. Mutual Benefit Life Ins. Co.*, 506 F. Supp. 542 (S.D. Iowa 1981).

78. *C.J.A.*, *supra* note 47 at para. 10.

79. *Ibid.* at para. 6.

80. *Ibid.* at para. 9.

fall within the definition of the term “accident” in *Walkem* and *Stats*. The objective foreseeability standard is unhelpful.

The decision is less confusing if we consider the Court’s assessment of the insured’s intentions. The judgment notes that “the intended result of autoerotic asphyxiation is sexual pleasure.”⁸¹ Notably, the Court does not invoke the insured’s intention to survive (though this might be implied). Rather, it invokes the insured’s purpose of taking the risk—namely, sexual pleasure.⁸² It is the purpose that explains the event and distinguishes it from the useless, foolhardy class of dangers in *Candler*. The Court’s example is telling:

We are reminded of this regularly by those concerned with the safety of children who may find old refrigerators or bags made of plastic film attractive as toys....

But if plastic film a child chose to put to his or her face were not removed or the door of the refrigerator in which a child chose to hide was not opened, I have no doubt all would agree his or her death was accidental.⁸³

Here, the intention of the child is clear—the refrigerator forms part of a child’s game. This purpose explains the risk-taking. Imagine, on the other hand, an adult climbs into a refrigerator in order to test her nerve through oxygen deprivation. The degree of this risk might be comparable to the risks involved in auto-erotic asphyxiation. The expectations of survival might be the same. It is the purposelessness of the latter which seems to render it outside the scope of accidental death coverage.

C.J.A. stands in contrast to *Davis v. Clarica Life Insurance Co.*⁸⁴ The insured was a young man known to the people that he roomed with to be a drug addict. The toxicologist’s report indicated a methadone overdose. His family claimed accidental death benefits. The insurer did not argue suicide or self-inflicted injury.⁸⁵ However, at trial the claimants were unable to provide evidence of the insured’s intentions in the moments surrounding his death. The decision states:

81. *Ibid.* at para. 6.

82. The judgment in *Bertalan*, *supra* note 46 is similar. The Court concludes: “Common experience would suggest a suicidal intention. But that inference is negated by the experience, knowledge, and motive of the insured [emphasis added],” *ibid.* at para. 6. The insured’s voluntary inhalation of nitrous oxide was explained by the insured’s pleasure-seeking and pattern of abuse.

83. *C.J.A.*, *supra* note 47 at paras. 10-11.

84. 2004 CarswellOnt 9743 [*Davis*].

85. *Ibid.* at para. 15.

The problem we have here is that as Ms. Kraft has pointed out, nobody was called who had been with Jamie before his death or at his death. All we know is that he was found dead and there is some indication that the people he was living with saw him lying on a mattress at two o'clock in the morning and phoned the police at eight o'clock in the morning. Particularly, we do not know anything about what was on his mind in the day or two before. Whether there was anything that would point to a wish to die or an intent to die or knowledge that if he took methadone he might die. Nothing about what he knew of the risks of the drugs. Some indication from [an] unnamed person spoken to at the scene that said he was a drug user. Obviously unreliable evidence.⁸⁶

The trial judge found that the claimants had not discharged their onus to show that the death was accidental and, thus, within the scope of the policy; accordingly, the judge dismissed the claim.

It is interesting to consider the onus that was placed on the claimants.⁸⁷ As the judgment indicates, there was no evidence tendered as to whether the insured wished to die. Where an insured takes a large and indiscriminate amount of drugs, an intention to cause self-harm or suicide might be inferred.⁸⁸ Here, the insured evidently took enough methadone to cause his death. Yet, the insurer did not argue self-harm or suicide. Where there is no evidence of an insured's subjective expectations, the court is entitled to consider what the expectations of a reasonable person in the place of an insured would have been. One might reasonably assume that if a person does not intend to die from some risk, he or she intends to survive the risk. This logic was applied, for example, by the British Columbia Court of Appeal in *Bertalan*, where the insured died from asphyxiation in the course of abusing nitrous oxide.⁸⁹ The Court stated that "[I]n the absence of an intention to commit suicide, the insured must have either miscalculated the amount by which he could reduce the oxygen flow to his brain or inadvertently did not pay sufficient attention to it."⁹⁰ What is missing in the evidence in *Davis*, however, is evidence of the purpose the insured held in

86. *Ibid.* at para. 19.

87. The question of onus facing the insured and the insurer is summarized by Osborne A.C.J.O., speaking for the Court on this point, in *Trafalgar Insurance Co. of Canada v. Imperial Oil Ltd.*, [2001] O.J. No. 4936, 57 O.R. (3d) 425 (C.A.) at para. 18: "The onus is on the insured to establish that, on a possibility basis, the allegations made by the plaintiff, if proved, bring the claim within the four corners of the relevant policy. Once that threshold is met, the onus shifts to the insurer to show that the claim made falls outside the coverage provided by the policy because of an applicable exclusion clause. If there is an exception to an exclusion, the insured bears the burden of establishing that the exception applies."

88. Russell S. Buhite & H. Maggie Marrero-Ladik, "Drugs, Alcohol, and Accidental Death Coverage" (2003-2004) 39 Tort Trial & Ins. Prac. L.J. 985 at 998-999.

89. *Supra* note 46.

90. *Ibid.* at para. 6.

taking his risk. The judgment seems to suggest that it is not sufficient for a claimant to simply rest on the fact that there was no record of self-harm or evidence of suicide. The insured must show something more. Without evidence of a motive or useful purpose behind the risk-taking, the risk looks entirely inexplicable. Many people use methadone as a painkiller, to help stabilize the withdrawal symptoms of morphine or heroin, or simply for pleasure. Its use, however, carries obvious risks. We do not know the purpose of those risks in this case. The judge rejected the evidence of the insured's reputation as a drug user. If reliable evidence had been tendered of the insured's history as a drug user, the result might have been different. Such evidence could have suggested that the insured had familiarity with the risk. It would have moreover provided an explanation for his risk-taking and taken his conduct outside of the category of superfluous or inexplicable risks.

2. *Is a useful purpose test reconcilable with existing law?*

If this hypothesis is correct and courts do, in fact, resolve cases with a concern for the insured's motives and impose an unarticulated onus on claimants to demonstrate some useful purpose in the insured's risk, we might question how this concern is reconcilable with the extant principles of insurance law. Two possibilities emerge. Firstly, a useful purpose test might be premised on a public policy aimed to discourage policyholders from engaging in wasteful and useless risk-taking or destructive conduct. Public policy augments or circumscribes the contractual rights of the parties to an insurance contract. For example, an insured is not able to recover losses which result from her criminal activities.⁹¹ A policy insuring for these losses would be void⁹² because, in the words of Lord Justice Salmon, "it would shock the public conscience if a man could use the courts to enforce a money claim either under a contract or a will by reason of his having committed such act."⁹³ Another example is the applicability of the expectations test to rescuers. Where an insured knowingly puts her

91. See e.g. *Sirois v. Saindon* [1976] 1 S.C.R. 735 [*Sirois*]; *Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742 at para. 14; *Goulet v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 719.

92. In most instances, this prohibition will simply reflect the exclusion for intentionally-caused losses which is implicitly or explicitly included in the contract. On some occasions, however, an insured will intend criminal harm, but not intend the scope or the scale of the loss. For example, in *Sirois, ibid.*, the insured intended to commit the intentional tort of assault when attempting to scare his neighbour by menacingly raising an operating lawnmower to his face. Yet, the insured did not intend the mower to slip and severely injure his neighbor's hand. An intentional tortious harm was intended, but the scale of the loss was not. Theoretically, an insurer and insured could agree to cover unanticipated losses resulting from intentional criminal harm.

93. *Gray v. Barr*, [1971] 2 Q.B. 554 at 581.

life in danger in attempting to save another's life, her losses are covered. The losses are deemed unexpected largely due to the public policy considerations at play.⁹⁴

Courts are very cautious about allowing insurers to invoke public policy as a limit on coverage, especially after a premium has already been received.⁹⁵ Public policy limits on recovery are construed narrowly.⁹⁶ It seems doubtful that a court would expressly deny parties the benefit of their contract simply in order to deter wasteful risk-taking. At least one commentator has recently suggested that goals of deterrence or denunciation are better addressed by the legislature than through an amorphous public policy exclusion to recovery on insurance policies.⁹⁷

Secondly, a useful purpose condition on coverage could be part of the contract. Two principles of construction are worth considering. Coverage is construed liberally and exclusions, narrowly.⁹⁸ The term "accident" is necessarily broad. Unsurprisingly, the breadth of the term has also made it a frequent source of litigation, yielding less-than-consistent results.⁹⁹

94. The decision reads: "Moreover, because the rescuer's conduct has high redeeming social value, we can rightly demand less caution in taking on the risk of death than we would demand of the Russian roulette player. This policy consideration, too, supports recovery." *Martin*, *supra* note 6 at para. 28. Notably, Chief Justice McLachlin's invocation of the public concern complements, rather than independently justifies her conclusion that rescuers ought not be denied coverage.

95. See e.g. *Manufacturers Life Insurance Co. v. Anctil* (1897), 28 S.C.R. 103 at para. 14.

96. *Standard Life Assurance Co. v. Trudeau* (1901), 31 S.C.R. 376.

97. Spain, "Reasonable Expectations", *supra* note 64 at 673.

98. See the comments of Justice Cory in dissent in *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87 at paras. 47-50. The doctrine is closely related to the *contra proferentem* rule suggesting that ambiguity must be constructed in favour of the insured. See e.g. *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at 899 [*Bathurst*]. Some comments in decisions of the Supreme Court of Canada, however, suggest that the two doctrines are distinct: *Lloyd's London Non-Marine Underwriters v. Chu*, [1977] 2 S.C.R. 400 at 405; *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252 [*Reid*]. This distinction suggests that construction of coverage broadly and exclusions narrowly applies even where policy provisions are unambiguous, though their breadth may be uncertain. See Billingsley, *supra* note 4 at 141.

99. For a comment on the inconsistency in the construction of the term accident in American law see Mark D. Ravreby, "'Accident' in the Insurance Context: Some Definitional Problems" (1973-1974) 23 Drake L. Rev. 721 at 744.

The scope of coverage in an accident policy is often uncertain.¹⁰⁰ The jurisprudence generally construes the uncertainty in the term "accident" in favor of the insured.¹⁰¹ It may be contrary to a liberal construction of the term, to read a useful purpose condition into coverage.

On the other hand, the uncertainty of the breadth of the term "accident"¹⁰² might be impliedly limited by the "reasonable expectations of the parties."¹⁰³ This doctrine militates against, in the words of Justice Estey, "a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could

100. It is not clear that the term "accident" is considered ambiguous in law. Eugene Mooney has distinguished syntactic ambiguity—or ambiguity arising from the arrangement of the words in a particular passage—from semantic ambiguity, which arises from an uncertainty as to a general term's breadth. Where courts are concerned with the breadth of the term "accident," this can be described as an instance of semantic ambiguity. Eugene F. Mooney, "Functional Analysis of Exceptions in Accident Insurance" [1964] U. Ill. L. Forum 495 at 532-534. Canadian courts have generally not analyzed the term "accident" as an ambiguous provision. Notably, if the term is ambiguous, a construction against the insurer—*contra proferentem*—applies. Attempts by claimants to characterize the term "accident" as ambiguous, while not expressly rejected, have generally fared poorly. See e.g. *Irving Oil Ltd. v. Institute of London Underwriters*, 2000 NBCA 23 at para. 14; But see *Sansalone v. Wawanese Mutual Insurance Co.* (1998), 158 D.L.R. (4th) 385 (B.C.C.A.) at para. 65 [*Sansalone*]. In the latter case, the Court suggests the doctrine of reasonable expectations applies, at least where a term is ambiguous. The Court invokes the doctrine to resolve uncertainty as to the breadth of the term "accident." Some Californian decisions have suggested that the term is ambiguous: *Sylla v. United States Fidelity & Guar. Co.*, 54 Cal. App. 3d 895 (1976); *Oil Base, Inc. v. Continental Casualty Co.*, 271 Cal. App. 2d 378 (1969). Generally, their courts have rejected the notion that the term "accident" is ambiguous. See James A. Fischer, "The Exclusion from Insurance Coverage of Losses caused by the Intentional Acts of the Insured: A Policy in Search of Justification" (1991) 14 Workers' Comp. L. Rev. 69 at 82.

101. *Gibbens*, *supra* note 35 at para. 23.

102. It is unclear whether the doctrine of reasonable expectations applies in circumstances where the policy provisions are not deemed ambiguous. See (M.S.) Teitelbaum, "The Reasonable Expectations Doctrine: Signs and Portents" (2006) 24 Can. J. Ins. L. at 30-32. Courts have applied the doctrine of reasonable expectations in cases where the decision did not analyze the term "accident" as being ambiguous: See e.g. *Martin*, *supra* note 6 at para. 12; *Wang v. Metropolitan Life Insurance Co.*, [2004] O.J. No. 3525 (C.A.) at para. 27; *Sansalone*, *supra* note 100 at para. 65. The implication of employing a reasonable expectations analysis to define the breadth of the term "accident" seems to be, either, that the term "accident" is ambiguous or that the doctrine of reasonable expectations applies even in circumstances where policy language is not ambiguous.

103. The formulation of the reasonable expectations doctrine is generally attributed to Professor Robert Keeton. Robert E. Keeton, "Insurance Law Rights at Variance with Policy Provisions" (1969-1970) 83 Harv. L.Rev. 961. In Canada, see e.g. *Bathurst*, *supra* note 98; *Reid*, *supra* note 98 at para. 39. The interpretive doctrine of reasonable expectations should be distinguished from the expectations test set out in *Martin*, *supra* note 6. The term "expectations" as used by the Court in *Martin* refers to the foresight of the consequences and expectations of loss from a particular course of conduct. The term is used as part of an interpretive doctrine to determine whether an insured, at the time of entering into the insurance agreement, expected certain risks to be covered. Its focus is on the expectations at the time of contract and regarding coverage, rather than at the time of risk-taking and regarding the likelihood of loss. It is an open question whether reasonable expectations ought to be extrapolated from a "typical" insured, or if they should be based upon the reasonable expectations of the individual insured before the court. See e.g. Jeffery E. Thomas, "An Interdisciplinary Critique of the Reasonable Expectations Doctrine" (1998-1999) 5 Conn. Ins. L.J., 295 at 328-330.

neither be sensibly sought nor anticipated at the time of the contract."¹⁰⁴ While the doctrine of reasonable expectations is invoked more often in support of recovery,¹⁰⁵ it has also been applied against the insured.¹⁰⁶ For example, a court might find the prospective customer who turned his or her mind to the breadth of coverage afforded under an accident policy would understand that losses resulting from risk-seeking behaviour are not borne by the insurer. A court could decide policyholders cannot reasonably expect coverage for conduct devoid of any purpose other than the thrill of risk itself. An insured's reasonable expectations might qualify the otherwise generous construction of uncertainty in his or her favour.

The invocation of reasonable expectations as a limit to an insured's recovery carries the danger of incorporating policy or value judgments into the way a contract is interpreted. For example, an insurer might argue that the use of illegal drugs is contrary to public policy and the insured ought not to have held a reasonable expectation of coverage for losses arising from drug use. Eugene Haring writes:

[An insured's reasonable] expectations will be colored by general knowledge and an appropriate response to the severe problem of drug abuse. The determination of those expectations will be affected by the degree of general knowledge of the problems of drug abuse. Strong legal guidance from the courts and effective education of the public together may lead us to appropriate responses to the problem of drug abuse and accidental death in each individual case.¹⁰⁷

In Haring's comment, interpretation and policy are impossible to distinguish. The contract is interpreted in relation to the general public policy against drug use, rather than the specific contractual intentions of the parties.

In *Gibbens*, Binnie J. writes:

The insurance insider will know, based on the vast repertoire of cases decided under accident policies, that all of these situations have given rise at the margins to fierce arguments. The cases necessarily involve value judgments related to the reasonable expectations of the parties.¹⁰⁸

104. *Bathurst*, *supra* note 98 at 901-902.

105. See Billingsley, *supra* note 4 at 143.

106. See e.g. *Gibbens*, *supra* 35 at para. 48; *Citadel General Assurance Co. v. Vyilingam*, 2007 SCC 46 at para. 4.

107. Eugene Haring, "Drug Abuse and Accidental Death Benefits: Hard Drugs and Hard Cases" (1972) 8 *Forum* 43 at 55.

108. *Gibbens*, *supra* note 35 at para. 52.

Respectfully, while it may be hard to divorce the two, the law should aspire to distinguish between the process for interpreting contracts and the imposition of public policy limits on the right to contract.¹⁰⁹ The need for this separation is particularly important in insurance law, where public policy limits on insurance are interpreted narrowly.

Aside from the public interest in deterring certain types of risks, it may be possible in many cases to say that policyholders are unable to reasonably expect insurers to bear the costs of risk-seeking behavior or gratuitous risk-taking. If this is so, the reasonable expectations doctrine offers a means to reconcile the unexplained and unarticulated concern for the character and purpose of an insured's risk-taking with extant legal doctrine.¹¹⁰ It would help to explain why cases involving similar degrees of risk, but involving risks with different economic or social value are treated differently.

Conclusion

In this paper, I have argued that the case law defining the term "accident" demonstrates a conspicuous concern for redeeming value behind an insured's risk-taking. Judges seem to employ two meanings of the phrase "courting the risk." Firstly, judges consider the insured's *ex ante* perceptions of the likelihood of loss. Where a risk is seen as being highly likely to materialize, an insured can be deemed to have courted or expected subsequent losses. Secondly, where losses materialize as the result of purposeless risk taking, the resulting losses are, again, deemed courted or expected. This concern for the redeeming value of risk does not fit with the subjective expectations of loss test outlined in *Martin*. Gratuitous risks are no more likely to materialize than gainful ones. A consideration of the value of a risk does not further the inquiry into expectations.

I have argued the case law evidences an unarticulated useful purpose test limiting accident coverage to instances where an insured can

109. James M. Fischer argues that approaching the issue as a matter of public policy rather than reasonability would be more transparent. He writes: "It would be more accurate if courts and commentators addressed [the doctrine of reasonable expectations] as a legal 'deus ex machina' designed to import public policy into private law." James M. Fischer, "The Doctrine of Reasonable Expectations is Indispensable, If We Only Knew What For?" (1998-1999) 5 Conn. Ins. L.J. 151 at 163. While as Fischer notes, *ibid.* at 164, that reasonableness and policy are often inextricably linked, it is possible, at least conceptually, to distinguish between a judgment finding it contrary to public policy that an insured not receive coverage for purposeless risk-taking and one finding that an insured would not reasonably expect coverage under his or her policy for purposeless risk-taking. At any rate, incorporating "purpose" considerations into either an assessment of reasonable expectations or public policy concerns would be significantly more transparent.

110. Madeline V. Dvorocsik argues that the concept of "fortuity" should not impliedly exclude reckless conduct. Madeline V. Dvorocsik, "Maritime Losses Resulting from Reckless Conduct: Are they Fortuitous?" (1996-1997) 75 Tex. L. Rev. 1133 at 1157-1159.

demonstrate some redeeming benefit or purpose. The cases would be more consistent and transparent if such a test were formalized. This is reconcilable with extant doctrine. An insurer might argue that a useful purpose requirement could form an implicit part of accident insurance contracts. A court is required to construe coverage in accordance with the reasonable expectations of the parties. It may be unreasonable for a policyholder to expect to be indemnified under an accident policy for the consequences of gratuitous risk-taking or risk-seeking behaviour.

